Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

AMP Group Submission

Case Study 1: Fees for no service

4 May 2018

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

AMP Group Submissions

Case Study 1: Fees for no service

Overview

1. These submissions address the evidence received by the Royal Commission in its second round of hearings, in relation to Case Study 1: fees for no service.

2. AMP takes responsibility for its past failings, and has taken, and continues to take, action to ensure that these failings do not recur, including enhancements to Advice systems, processes and governance, and the identification and remediation of affected customers.

3. AMP acknowledges its failings consistent with the evidence which is before the Commission but does not accept all of the open findings which Counsel Assisting submits should be made. AMP further submits that the proper forum for a determination regarding AMP's conduct is before ASIC, and any judicial proceeding ASIC may commence.

4. In particular, AMP strenuously denies the allegation by Counsel Assisting that it is open to find that it has committed a criminal offence in providing to ASIC in October 2017 a report prepared by Clayton Utz. That report is uncompromisingly direct and comprehensive and is the result of multiple employee interviews. It can only have been of assistance to ASIC in its investigation, and to Counsel Assisting in preparing cross-examination. It contains serious adverse findings, including a number of inaccurate or misleading statements to ASIC which form the basis of Counsel Assisting's submission on that topic.

5. The issues raised by the case study with respect to AMP concerned matters that are almost entirely the subject of an ongoing ASIC investigation. That investigation commenced in 2015 and has involved compulsory examination of numerous AMP current and former employees and the production of hundreds of thousands of documents to ASIC. As AMP understands it, ASIC was nearing completion of that investigation at the time the Royal Commission hearings commenced. Given the seriousness of the matters being investigated, AMP fully expects that ASIC will deal with them in an appropriate manner consistent with ASIC's enforcement priorities, and under a proper process, with affected parties having had an opportunity to be heard.

6. The Terms of Reference for the Royal Commission state that the Commissioner is not required to inquire into a particular matter to the extent that he is satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

7. There is no reason for the Commissioner to believe that ASIC will not deal with the matter appropriately.

AMP's Advice business

8. AMP has a network of approximately 2,800 financial planners (**Advisers**). About 90 per cent of these Advisers are self-employed, small business owners, and are Authorised Representatives (**ARs**) appointed by various AMP Advice Licensees to provide specified financial services. These

Advice Licensees include AMP Financial Planning Pty Ltd (**AMPFP**), Charter Financial Planning Limited (**Charter**) and Hillross Financial Services Ltd (**Hillross**) which are subsidiary companies of AMP.

9. Accordingly, most of the Advisers in AMP's network are not employees of AMP. To the extent that Advisers are employed by AMP, these Advisers are mostly with ipac Securities Limited (now branded AMP Advice) and are employed by an AMP service entity.

Fees for no service

10. During the second-round hearings concerning financial advice, the Royal Commission considered several case studies involving AMP Advice Licensees failing to turn off fees for certain customers in relation to services they did not receive. This conduct is commonly referred to as 'fees for no service'.

11. Specifically, the Royal Commission considered AMP Advice Licensees' failure to turn off fees in the context of 'buy-back arrangements' and a practice known as the '90 day exception', which applied in some instances to those buy-back arrangements.

Customer register buy-back arrangements

12. Under the terms of the agreements between AMP's Advice Licensees and the Advisers who are their ARs, there are buy-back arrangements, which allow an Adviser to sell their register, or book, of customers to the Licensee, in certain circumstances.[1] In respect of AMPFP, the buy-back arrangement is referred to as Buyer of Last Resort (**BOLR**) and is governed by the BOLR Policy,[2] which was agreed between AMPFP and the representative body for AMPFP Advisers known as the AMP Financial Planning Association.

[1] Witness Statement of Anthony George Regan dated 11 April 2018 (**Regan Statement 2-4**) (Exhibit 2.13) at [145]-[158]; see also T1061.34-T1062.17.

[2] Exhibit AGR-1 to Regan Statement 2-4 (**Exhibit AGR-1**), tab 20 (AMP.6000.0007.0658) and tab 21 (AMP.6000.0007.2872).

13. When a register of customers is purchased by the Licensee under the buy-back arrangements, the customers are placed in a buy-back pool pending purchase by a new Adviser.

14. Between 2010 and 2017, there have been 753 buy-back transactions by AMP Advice Licensees (AMPFP, Hillross and Charter). There have been 2,417 customer register transactions in that period, including planner-to-planner acquisitions, on-sales from AMP Advice Licensees from a buy-back pool and practice start-ups.[3]

15. The BOLR Policy requires ongoing service fees (**OSFs**) to be switched off upon entry into the BOLR pool, so that only product commissions continue to be paid by customers without an Adviser.[4] The Policy also requires letters to be sent to customers, advising them that services would no longer be provided, and therefore the planner service fee would be removed from their accounts.[5]

Switching off OSFs

16. AMP accepts that, in breach of its duty to provide financial services efficiently and fairly, 15,712[6] customers since 2008 paid ongoing service fees while in a Licensee buy-back pool.

Administrative and process errors

17. The failure to turn off fees for some customers, resulting in those customers paying OSFs to the Licensee, but not receiving an ongoing service, arose in a number of ways:

    a. in the majority of cases, it was the result of an administrative or process error (such as failure of manual systems to turn off fees or a breakdown in communications between different parts of the organisation);

[3] Exhibit AGR-1, tab 25 (AMP.6000.0029.1319).
[4] Regan Statement 2-4 at [161]; T1067.16-21.
[5] Regan Statement 2-4 at [162]; Exhibit AGR-1, tab 23 (AMP.0001.0061.0279 and AMP.6000.0039.0001).
[6] Regan Statement 2-4 at [205].

b. in approximately 22% of cases (relating to the customers of 8 Advisers),[7] it was the result of inadequate arrangements to ensure that fees were turned off following the termination of an Adviser for serious compliance concerns;[8]

c. in approximately 13%[9] of cases, involving 39 BOLR transactions, it was the result of an authorisation to allow the fees to remain on for a period of up to 90 days (the **90 day exception**);

d. in approximately 10% of cases, it was the result of an authorisation to maintain the customer register outside of the BOLR pool with fees left on (**ring-fencing**).[10]

18. The issue of process or administrative errors leading to the failure to switch off fees for customers in the BOLR pool was first identified by AMP in September 2008, and was breach reported to ASIC by AMPFP on 15 January 2009.[11]

19. On 27 May 2015, AMP breach reported the issue of administrative processes failing to turn off fees for some customers in connection with buy-back transactions with AMPFP, Hillross and Charter.[12]

90 day exception

20. The 90 day exception was a business practice that developed as an exception to the BOLR Policy which required OSFs to be switched off upon the completion of a buy-back transaction. In some cases, where an incoming Adviser had been identified to purchase the customer register of an Adviser who was exercising their buy-back rights, but the incoming Adviser was unable to complete the transaction at the relevant time (for example due to a delay in resolving commercial terms), an exception was

[7] Exhibit AGR-1, tab 31 (AMP.6000.0001.3575).
[8] Regan Statement 2-4 at [335(a)] and [335(c)].
[9] T1199.42-43.
[10] Regan Statement 2-4 at [335(b)] and T1054.31-T1055.9.
[11] Regan Statement 2-4 at [214]; Exhibit AGR-1, tab 33 (AMP.6000.0001.1460).
[12] Exhibit AGR-1, tab 24 (AMP.6000.0001.1469).

granted to the BOLR policy to allow the OSFs to remain on for a period of up to 90 days to facilitate the on-sale.[13]

21. The exception appears to have been intended (noting it was not always effective) to place an upper limit on the time that a customer could be charged fees without having an Adviser, while they were in the process of being transferred.

22. Contrary to Counsel Assisting's submissions,[14] there was not a general rule developed in 2013 that fees would be left on for 90 days. The general rule was that fees were to be turned off. The 90 day exception and ring-fencing were exceptions to the BOLR Policy, generally authorised by the Managing Director or Head of Financial Planning of the relevant Advice Licensee, under a purported exercise of delegated authority.[15]

23. In the period 2010-2017, of the 2,417 register transactions that took place, 39 were BOLR transactions which involved an application of the 90 day exception.[16]

24. The recommendations in the document[17] which Counsel Assisting relies upon[18] to suggest that there was a general rule developed in 2013 that fees would be left on for 90 days does not appear to have been implemented.[19]

25. The breach report to ASIC on 27 May 2015 regarding the failure to turn off OSFs in the context of buy-back transactions described the cause of the failure as an administrative error. The fact that some of those instances were the result of an authorisation to leave the fees on was not reported to ASIC until August 2015.[20] However, in the two letters in August 2015

[13] Regan Statement 2-4 at [166].
[14] T1937.31-35.
[15] Regan Statement 2-4 at [174].
[16] Regan Statement 2-4 at [170]; T1199.37-40.
[17] Exhibit 2.32 (ASIC.0019.001.0075).
[18] T1937.31-33.
[19] The investigation conducted by Clayton Utz (as to which, see below at [31] and following) interviewed 27 employees and involved a detailed review of documents. It found the relevant memorandum was never finalized (at Exhibit AGR-1, tab 3 (AMP.6000.0010.0440) at [25]) and it also suggests the practice remained an exception, rather than a general rule as suggested by Counsel Assisting, throughout the period.
[20] Exhibit AGR-1, tab 38 (AMP.0001.0044.6665) and tab 39 (AMP.1000.0001.8517).

referring to the 90 day exception, it was stated that the practice only applied from July 2010 to December 2013. On 23 November 2016, AMPFP advised ASIC that the time periods given in the August 2015 letters were incorrect and, in fact, the 90 day exception had continued beyond January 2014.[21]

26. On 15 November 2016, a direction was made that the 90 day exception cease.[22] AMP commissioned Deloitte to perform a review to provide assurance that the 90 day exception had, in fact, ceased in November 2016, and that all affected customers had been identified and remediated.[23] Deloitte provided that assurance on 24 November 2017.[24]

Ring-fencing

27. Ring-fencing of a customer register (so as to keep a particular group of customers together, rather than being disaggregated in the BOLR pool) is a related practice.[25] There is nothing wrong with the practice of ring-fencing per se, provided the ongoing fees are not left on where services are not provided.[26] For example, this practice allows customers in a particular regional area to be kept together to be serviced by a local Adviser. However, in some instances of ring-fencing, the fees were left on, and customers were not provided with services.

28. This conduct was breach reported to ASIC on 3 May 2017.[27] The breach report stated that the cause was inadequate arrangements for ensuring customer registers were transferred to the BOLR Pool.

Clarification – communications with ASIC

29. Communications between AMP and ASIC regarding the issue of fees for no service have attracted a high degree of public interest. Accordingly, it is important to clarify the nature and scope of those communications.

---

[21] Exhibit AGR-1, tab 43 (AMP.6000.0010.0015).
[22] Exhibit AGR-1, tab 43 (AMP.6000.0010.0015).
[23] Regan Statement 2-4 at [178].
[24] Exhibit AGR-1, tab 28 (AMP.6000.0042.0001).
[25] Regan Statement 2-4 at [184].
[26] Regan Statement 2-4 at [184].
[27] Exhibit AGR-1, tab 30 (AMP.6000.0001.1894).

30. AMP recognizes that any misrepresentation to ASIC is plainly unacceptable. However, the number of separate misrepresentations said to have been made by AMP to ASIC was nonetheless overstated by Counsel Assisting. The evidence is that there were seven misrepresentations (in 12 communications), not 20.[28] These were set out in the report provided to ASIC by AMP in October 2017.[29] This report was also exhibited to the witness statement of Mr Regan provided to the Commission in March 2018.[30]

The Clayton Utz investigation and report

Why the Report was commissioned

31. On 3 April 2017, ASIC issued AMPFP a notice under section 33 of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**), requiring the production of documents in connection with its investigation of fees for no service.

32. In the course of identifying and producing the documents responsive to that notice, AMP identified documents which suggested that the 90 day exception was implemented contrary to legal advice and objections from within the business.

33. When those documents were brought to the attention of AMP's General Counsel, Dispute Resolution & Regulatory Engagement, she immediately escalated the matter, via the Group General Counsel and Mr Regan, to the CEO and Chairman of AMP. As a result, the Chairman and CEO of AMP contacted the Chair and Deputy Chair of ASIC respectively on 25 May 2017.[31] ASIC was informed that AMP intended to commission an investigation, and would share the findings of that investigation with ASIC.

---

[28] Counsel Assisting's count of 20 instances was reached by counting multiple instances of the same representation.
[29] The Clayton Utz report (as to which, see below at [31] and following); Exhibit AGR-1, tab 3.
[30] Exhibit AGR-1, tab 3.
[30] Regan Statement 2-4 at [272].
[31] Regan Statement 2-4 at [32]-[33].

34. On 5 June 2017, the Chair and CEO of AMP, on behalf of the Board, appointed Clayton Utz to conduct an investigation, and to produce a report for the Board.

35. The report was received by the Board at a meeting on 16 October 2017.[32] Rather than simply share the findings of the investigation with ASIC, in order to assist ASIC with its own investigation, the Board instead chose to share the whole report with ASIC, along with the underlying legal advices examined by the report.[33] The Chairman, CEO, Group General Counsel and Mr Regan, met with ASIC and provided the report to them the same day.

36. The report is a forensic and detailed 87 page review of documents and the result of interviews with 27 current and former employees. Addressing the matters the Board of AMP required it to investigate, pursuant to the letter of instruction,[34] Clayton Utz made numerous serious adverse findings in respect of certain of AMP employees, as well as its systems, processes, culture and governance.

Misconceptions about the Clayton Utz report

37. Criticism has been levelled at AMP, by Counsel Assisting regarding the way in which the Clayton Utz report was produced.

38. Counsel Assisting's questions to Mr Regan suggested or implied that more than 700 emails had been exchanged between AMP and Clayton Utz about the content of the draft report.[35] That suggestion overstates the number of communications.

---

[32] Exhibit 2.249 (AMP.6000.0006.2286).

[33] The decision was made, notwithstanding any privilege claim AMP may have had in relation to the report and the underlying legal advices examined in the report. ASIC issued a s33 Notice for the production of the report at AMP's request, and a Voluntary Disclosure Agreement was entered into prior to production.

[34] Exhibit AGR-1, tab 2 (AMP.6000.0033.0001 and AMP.6000.0033.0005).

[35] T1176.17-23.

39. The documents shown to Mr Regan[36] were a record of the documents produced by AMP in response to a notice to produce.[37] The listing of documents produced overstates the number of communications between AMP and Clayton Utz with respect to the content of the report.

40. The spreadsheets tendered by Counsel Assisting list the output from the document management system. That system lists emails and their attachments as separate documents, as can be seen from the "Host ID" column. This results in an email and its attachment being counted as two documents, when they are a single communication.

41. In this regard, it was apparent Mr Regan could give little, if any, relevant evidence on the topic, as he was not involved in any material way in the preparation of the Report. It was not a topic he knew would be the subject of questioning, and he was therefore unable to be prepared to give evidence that would assist the Commissioner. Yet Mr Regan's answers were used to make very serious allegations against numerous people who were not heard about those matters.

42. The investigation by Clayton Utz included 27 interviews with current and former employees. When a calendar invitation is sent by Microsoft Outlook, acceptances and rejections of that invitation generate a separate email from each meeting recipient. Those communications were produced and are included in the spreadsheets tendered by Counsel Assisting. These documents can be seen listed in the "Document Type" column as "Microsoft Outlook Schedule".[38]

43. As can be seen from the spreadsheet tendered by Counsel Assisting as Exhibit 2.45, the first draft of the report was provided on 25 August 2017.[39] Accordingly, communications before this date primarily relate to scheduling interviews, and providing documents and other factual

[36] Exhibit 2.47 (RCD.9999.0012.0001, RCD.9999.0012.0002, RCD.9999.0012.0003, and RCD.9999.0012.0004).

[37] Exhibit 2.46 (RCD.0002.0001.1314).

[38] An example of this type of document is at Exhibit 2.269 (AMP.6000.0061.7848).

[39] The suggestion drawn from this spreadsheet (at T1174.20-26), that 25 drafts of the Clayton Utz report were provided also overstates the true number. As can be seen from Exhibit 2.45 (RCD.9999.0013.0001), there are both pdf and word versions produced on the same day and in some cases these are the same document, but simply in different formats.

information, rather than any substantive interaction regarding the content of the report.

44. Once these three matters are accounted for, 255 documents remain in Exhibit 2.47. However, even this number significantly overstates the extent of substantive interaction as to the contents of the report, as the remaining list contains duplicates,[40] progress updates[41] and communications of an administrative nature.[42]

45. Moreover, the questions put to Mr Regan suggested or implied that both Mr Meller, the CEO of AMP, and Ms Brenner, the Chairman of AMP, sought to improperly influence the content or findings of the report, particularly in respect of Mr Meller's role in the conduct being investigated.[43] There is no basis for such a finding. The evidence discloses no reasonable basis for a finding that either Mr Meller or Ms Brenner acted inappropriately.

46. Mr Meller was provided with one draft of the report prior to the 16 October 2017 Board meeting. He participated in two telephone calls on 21 September 2017 with Mr Regan, Mr Salter, Mr Mavrakis and Ms Baker Cook. The evidence shows that, during those telephone calls, Mr Meller requested that where individuals were identified in the report, their culpability, or otherwise, be squarely addressed.[44] Those telephone calls were also the only evidence of any involvement by Mr Regan in the production of the report.[45]

47. As a result of that feedback, Clayton Utz, rather than inserting a statement regarding Mr Meller's culpability, removed his name from where it had

---

[40] See for example T1193.15-18, where Counsel Assisting put up more than one document ID which proved to be duplicates – Exhibit 2.63 (AMP.6000.0054.6720) and AMP.6000.0062.7767 were the same email.

[41] Clayton Utz' letter of instruction required it to give regular updates on the progress of the investigation: Exhibit AGR-1, tab 2 (AMP.6000.0033.0001 and AMP.6000.0033.0005).

[42] Such as providing further background documents to Clayton Utz. See, for example, Exhibit 2.270 (AMP.6000.0062.2774).

[43] T1178.1-45; T1180.1-1182.27; T1190.20-1192.20.

[44] Exhibit 2.273 (AMP.6000.0062.6108).

[45] His evidence was that he reviewed a version of the report provided on 19 September, and made comments on that draft, but those comments were not substantive changes (T1177.24-46).

been listed in the report as a person who had been interviewed. Clayton Utz explained the rationale as being that the inclusion of Mr Meller's name, in circumstances where they had formed the view that he was not culpable, would attract unnecessary attention from ASIC.[46] Again, there is no evidence that any member of the Board, including Ms Brenner, or Mr Meller knew of this rationale.

48. Further, the suggestion by Counsel Assisting that Mr Meller's was the only name removed from the draft report[47] is incorrect. As can be seen by comparing the draft shown to Mr Regan[48] with the final report,[49] Mr Pally Bargri's name was also removed from the same list.

49. Ms Brenner's actions in relation to the report were appropriate and consistent with good governance. Ms Brenner received two versions of the report. The first was on 25 September 2017. There was no indication in the email from Clayton Utz sending her that version that the report was still a draft; it states, "*attached is a copy of our BOLR Report*".[50] Nor did that email (or any other) offer Ms Brenner advice about the manner in which the document ought to be treated.

50. It is plain from the minor amendments that resulted from her call with Mr Mavrakis of Clayton Utz on 26 September 2017[51] that Ms Brenner only sought clarification of factual matters during that call.

51. Clayton Utz provided a final report to Ms Brenner by email on 6 October 2017.[52] It is reasonable to assume that one of Ms Brenner's key concerns in commissioning the report was to understand the position of Mr Meller, given that he was the then CEO and, prior to 1 January 2014 the advice business had reported in to him. Ms Brenner was no doubt aware that Mr Meller had been interviewed as part of the investigation. It would therefore have been surprising to her to find that the report contained no mention of

[46] Exhibit 2.66 (AMP.6000.0052.1590).
[47] T1180.40-41.
[48] Exhibit 2.52 (AMP.6000.0052.0924 at .0932).
[49] Exhibit AGR-1, tab 3 (AMP.6000.0038.0001 at .0009)
[50] Exhibit 2.54 (AMP.6000.0054.6489).
[51] Exhibits 2.271 (AMP.6000.0052.1097) and 2.272 (AMP.6000.0052.1098).
[52] Exhibit 2.62 (AMP.6000.0062.7501, AMP.6000.0062.7502, and AMP.6000.0062.7503).

him. That can be inferred from Ms Brenner's request that Clayton Utz' findings (whatever they may be) regarding Mr Meller be included. Ms Brenner also sought clarification of the use of the term "senior management", so the report was clear as to who was meant by that term.[53]

52. Further, there can be no fair criticism of the entire Board's role in relation to the report.

53. The Board was provided a final version of the report on 10 October 2017,[54] in advance of the board meeting on 16 October 2017.

54. Following the clarifications sought by Ms Brenner, discussed above, a small number of amendments were made to the report on 15 October 2017. Those amendments were provided to the Board on 15 October 2017,[55] given that they were amendments to the report that had been provided to the Board in the board papers on 10 October 2017. It is clear from the minutes[56] that the Board was not settling, approving or otherwise playing any role in relation to those changes, or the report more generally.[57] It was simply receiving the report that it had commissioned, along with management's advice in relation to what steps should be taken in relation to the issues identified by the report.

55. The extent of the involvement that Mr Salter had in the preparation of the report was surprising to the Board of AMP, as it was to Mr Regan. All of the members of the Board were unaware of the extent and the nature of the exchanges between Mr Salter and Mr Mavrakis. The instructions to

---

[53] See Exhibit 2.64 (AMP.6000.0054.6765) and Exhibit 2.63 (AMP.6000.0054.6720). Although on first blush Mr Salter's email (at Exhibit 2.63 (AMP.6000.0054.6720)) may suggest Ms Brenner's request was for the inclusion of a finding exonerating Mr Meller, it is plain, when comparing Ms Brenner's own email (at Exhibit 2.64 (AMP.6000.0054.6765)) that that is an unfortunate choice of language on the part of Mr Salter (no doubt as a result of Mr Salter's knowledge of the conclusions that Clayton Utz had already reached regarding Mr Meller).

[54] Exhibit 2.274 (AMP.6000.0075.8381). This was the same as the final version provided to Ms Brenner on 6 October 2017 (see Exhibit 2.62 (AMP.6000.0062.7501, AMP.6000.0062.7502, and AMP.6000.0062.7503)).

[55] Exhibit 2.274 (AMP.6000.0075.8381) and Exhibit 2.275 (AMP.6000.0075.8302).

[56] Exhibit 2.249 (AMP.6000.0006.2286).

[57] Contrary to the exchange between Mr Regan and Counsel Assisting at T1191.3-15. It was plain that Mr Regan had no knowledge of the documents he was being shown nor of the role the Board played.

Clayton Utz expressly provided that, if at any time, issues of concern arose with respect to any GLT member (which included Mr Salter), Clayton Utz was to deal directly with Ms Brenner.[58] Mr Mavrakis attended the Board meeting on 16 October 2017. He did not raise any concerns with the Board about the accuracy of the report or the manner in which it had been prepared. The Board had no reason to suspect that the report may not been have prepared in accordance with their instructions.

56. Irrespective of Mr Salter's involvement with the production of the report, there is no evidence before the Royal Commission that Mr Salter made any changes that Clayton Utz did not agree with, or that Clayton Utz does not stand behind the report. In fact, the evidence shows that Clayton Utz had carefully verified the accuracy of statements made in the report.[59]

57. Moreover, the report itself is detailed, contains serious adverse findings, and is uncompromisingly direct and comprehensive in its assessment of the matter. It was provided to ASIC and must have, by its very nature, been of material assistance to ASIC in progressing its investigation into AMP's conduct. At no point was ASIC required to accept or rely on any of its findings, and was free to, and in fact did, continue with its investigation. It is significant that Counsel Assisting extensively relied upon the veracity of the Report in identifying the relevant misrepresentations to ASIC.

58. Irrespective of any criticism that might be levelled at the production of the Clayton Utz report, it was an important and powerful catalyst for the actions AMP has taken and is taking to address the findings which it made.

Action taken by AMP

59. At the Board meeting on 16 October 2017 where the Board formally received the Clayton Utz report, a Board Committee was formed to work with a sub-committee of the Group Leadership Team to oversee and

[58] Exhibit AGR-1, tab 2 (AMP.6000.0033.0001 and AMP.6000.0033.0005).
[59] Exhibit 2.50 (AMP.6000.0054.6318).

implement a program of work to address the issues arising from it,[60] including work that was already underway.

60. That program of work is comprehensive and ongoing, and includes the following:

a. remediation to identify and remediate customers for instances of fees being paid where services have not been provided from 1 July 2008 onwards. To date, 15,712 customers have been remediated, with compensation paid of about $4.712 million. While AMP has remediated many customers, it acknowledges the process has been too slow. AMP is committing more resources and exploring ways to accelerate this process;

b. an independent external workplace investigation by Workdynamic Australia into the employee conduct issues identified in the Clayton Utz report;[61]

c. a culture audit undertaken by Deloitte;[62]

d. centralisation of AMP's regulatory engagement which commenced in July 2017. Responses to notices and requests for information from ASIC to AMP Advice Licensees are now generally addressed by a specialist centralised Regulatory Engagement Team, which reports to the General Counsel, Dispute Resolution & Regulatory Engagement. These responses are now subject to formal verification and certification by those responsible within the business. These processes have been reviewed and assured by external counsel;[63]

e. the Advice Business Review Program. This program consolidates a series of reviews across the advice business conducted by external consultants.[64] These reviews include an end-to-end review of buy-back controls undertaken by Deloitte. This review assessed whether

[60] Regan Statement 2-4 at [37]; Exhibit 2.249 (AMP.6000.0006.2286).
[61] Regan Statement 2-4 at [252]-[257].
[62] Regan Statement 2-4 at [37(b)].
[63] Regan Statement 2-4 at [273]-[278].
[64] Regan Statement 2-4 at [42]-[45].

internal controls were suitably designed, appropriately implemented and operating effectively across transactions including practice-to-practice transfers and BOLR;[65] and

f. the Advice Business Review Program includes enhancements to the monitoring and supervision of Advisers. These enhancements, and their role in addressing the issue of individual Advisers charging ongoing fees without providing services is addressed at [79] and following below.

61. After commencing as Group Executive, Advice in January 2017, Mr Regan commenced a substantial restructuring of the Advice Business, which included:[66]

a. the appointment of new managing directors to four of AMP's Advice Licensees (AMPFP, Charter, Hillross and Jigsaw Support Services);

b. redirecting responsibility for the remediation and compliance functions to AMP's Chief Risk Officer, to enhance oversight;

c. realigning the Channel Services function (which delivers support services to the Licensees) to focus on delivering operational support to the Licensees; and

d. strengthening the governance framework by:

i. establishing an Advice Risk and Compliance Committee to oversee the integration of risk and compliance management through the Enterprise Risk Management framework;[67]

ii. establishing an Advice Financial Risk and Capital Committee to oversee and monitor material financial risk and capital exposures and opportunities, including with respect to Licensee remuneration and management of buy-back programs;[68]

[65] Regan Statement 2-4 at [200]-[204].
[66] Regan Statement 2-4 at [40]-[41].
[67] Regan Statement 2-4 at [19(a)].
[68] Regan Statement 2-4 at [19(b)].

iii. implementing an Investment and Advice Committee;[69]

iv. the formation of a Buyback Oversight Committee to monitor, review and manage buy-back transactions across all Licensees;[70]

v. moving from concurrent to separate board meetings for the four principal Advice Licensees;[71] and

vi. amendments to the delegations' framework. All buy-back transactions must now be approved by both the Director, Channel Performance & Growth and the relevant Licensee Managing Director.[72]

Counsel Assisting's open findings

62. In Counsel Assisting's closing address, the following findings were said to be open and questions posed.

63. Note that in the Commission's Terms of Reference, "misconduct" is given the following meaning:

> *"misconduct includes conduct that:*
>
> *(a) constitutes an offence against a Commonwealth, State or Territory law, as in force at the time of the alleged misconduct; or*
>
> *(b) is misleading, deceptive, or both; or*
>
> *(c) is a breach of trust, breach of duty or unconscionable conduct; or*
>
> *(d) breaches a professional standard or a recognized and widely adopted benchmark for conduct."*

64. Where the term "misconduct" is used in the submissions below, it is used in the sense defined by the Terms of Reference.

[69] Regan Statement 2-4 at [41(d)(ii)].
[70] Regan Statement 2-4 at [19(c)], [204].
[71] Regan Statement 2-4 at [41(d)(iii)].
[72] Regan Statement 2-4 at [203].

***Question**: why has AMP placed such emphasis on the question of whether an employee or executive received legal advice explaining that it was unlawful to charge for fees for no service?*

65. The proposition put to Mr Regan,[73] that it is obvious that you cannot charge fees for a service that you are not going to provide is plainly uncontroversial. However, the effect of the proposition put to Mr Regan is that mere knowledge of the existence of the 90 day exception should therefore be sufficient to understand that it was illegal. This is an oversimplification of the position that AMP employees and executives found themselves in at the time.

66. Mr Regan's answers were given with the benefit of having seen legal advice on the question. As Mr Regan himself noted, the receipt of advice on the question of how the law applied to the particular factual circumstances may be critical to an individual's understanding of whether the 90 day exception practice was unlawful.[74]

67. For those employees and executives who had not been provided with legal advice, it was not necessarily apparent that the 90 day exception was unlawful. The 90 day exception[75] and ring-fencing[76] generally applied in circumstances where there was an expectation that the client register would be on-sold to another Adviser within a reasonable timeframe. Although services for individual customers vary,[77] a common ongoing service is the offer or provision of an annual review.[78] In those circumstances, if there was an expectation that an incoming planner would be in a position to provide the service (that is, the annual review) within the timeframe that it was due to be provided (that is, within 12 months of the last review or initial advice) it is less obvious, in the absence of legal advice on the question, that a customer without an Adviser for a short

[73] T1073.1-6; T1088.20-21.
[74] T1088.16-18.
[75] T1121.24-29; Exhibit AGR-1, tab 3 (AMP.6000.0010.0440 at .0456 [28]).
[76] T1069.24-47.
[77] Because each Adviser is responsible for negotiating the terms of any ongoing service arrangement with individual customers.
[78] Regan Statement 2-4 at [75].

period would be paying fees for a service they did not receive, in contravention of the law.

68. Knowledge, or otherwise, of the unlawfulness of the 90 day exception, is relevant to individual culpability (as Counsel Assisting noted[79]). It is also critically relevant to:

    a. whether members of senior management were aware that unlawful conduct was being engaged in, by the mere fact of knowledge of the practices; and

    b. whether the requisite knowledge exists to establish a contravention of section 1308 of the Corporations Act.

69. In November 2017 AMP launched an external workplace investigation to determine any disciplinary consequences for individuals.[80]

70. AMP has ensured that it is now well understood within its Advice Licensees that the law requires fees to be turned off upon a customer ceasing to have an Adviser available to provide service. Indeed AMP's remediation program is based upon the principle that fees paid from day one without an Adviser will be paid compensation together with missed earnings.

Open finding*: it is open to the Commissioner to find that the charging of fees for no service by AMP and its advice licensees might have amounted to misconduct.*

71. AMP accepts that this finding is open.

72. In particular, Counsel Assisting submitted that there had been contraventions of sections 912A(1)(a), (c), (ca) and (h), and 912D(1B) of the Corporations Act and sections 12CB and 12DI(1) and (3) of the ASIC Act.

[79] T1940.31-32.
[80] Regan Statement 2-4 at [252]-[255].

73. As AMP accepted in the breach notices that it gave to ASIC on 27 May 2015,[81] 5 December 2016,[82] 3 May 2017,[83] and 8 June 2017,[84] its Licensees have breached the condition of their financial services licenses to provide financial services efficiently and fairly (section 912A(1)(a) of the *Corporations Act*).

74. AMP also acknowledges that it is open to the Commissioner to find that there has been a failure of its Licensees to lodge a breach report within 10 business days after becoming aware of a breach, or likely breach, of section 912A(1)(a) (section 912D(1B)). Given the contraventions of sections 912A(1)(a) and 912D(1B), AMP further acknowledges that it is open to the Commission to find that its Licensees have breached the condition of their financial services licenses that they comply with financial services laws (section 912A(1)(c)).

75. Sections 912A(1)(ca) and (h) relate, by their terms, only to fee for no service – Adviser, and are addressed at [79].

76. In respect of the remaining contraventions that Counsel Assisting submitted were open, the Terms of Reference for the Commission state that the Commissioner is not required to inquire into a particular matter to the extent that he is satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding. The conduct of AMP and its Advice Licensees in relation to charging fees for no service is the subject of an ongoing ASIC enquiry.[85] There is no evidence before the Commission to suggest that ASIC will not sufficiently and appropriately deal with that matter, and therefore the Commissioner ought to be satisfied that ASIC will do so. To that end, it is respectfully submitted that the Commissioner should not make findings in respect of sections 12CB and 12DI(1) and (3) of the ASIC Act, particularly where, in respect of section 12DI, the

[81] Exhibit AGR-1, tab 24 (AMP.6000.0001.1469).
[82] Exhibit AGR-1, tab 29 (AMP.6000.0001.3573).
[83] Exhibit AGR-1, tab 31 (AMP.6000.0001.3575).
[84] Exhibit AGR-1, tab 32 (AMP.6000.0001.3577).
[85] Regan Statement 2-4 at [139].

contravention would be a criminal offence, and the Commission does not have before it all relevant evidence on the question of the requisite intent.

***Open finding**: it is open to the Commissioner to find that this conduct was attributable, at least in part, to the culture and governance practices within AMP.*

77. Consistent with the evidence that AMP put before the Commission, both in Mr Regan's statement[86] and the Clayton Utz report,[87] AMP accepts that this finding is open.

78. For this reason, the steps AMP has taken as a result of the findings in the Clayton Utz report include a culture audit, and measures to strengthen the governance framework (as set out at [59] to [61] above).

***Open finding**: It is also open to the Commissioner to find that the conduct was attributable to poor risk management practices at AMP.*

79. In respect of individual Advisers charging fees without providing services, the evidence and case studies demonstrate that:

    a. the conduct has emerged partially as a result of factors outside of AMP's Advice Licensees' control (i.e. the pace of regulatory change and the existing skill sets of the Adviser network);[88] and

    b. the conduct was attributable to the personal circumstances (and subsequent failures to act) of particular Advisers (rather than systemic issues particular to AMP's Advice Licensees).[89]

80. That is, the conduct is not attributable to poor risk management practices within AMP's Advice Licensees, and the particular conduct identified would not be addressed by more stringent practices by any Licensee.

---

[86] Regan Statement 2-4 at [37(b)] and [207] (culture) and [41], [200], [203], and [233] (governance).

[87] Exhibit AGR-1, tab 3 (AMP.6000.0010.0440 at .0482 [96], .0483 [100], .0490-.0492 [129]-[135], and .0525-.0526 [248] (culture), and .0458-.0459 [33], .0487-.0488 [119], and .0490 [128(e)] (governance).

[88] Regan Statement 2-4 at [291].

[89] Exhibit SCB-1 to the Witness Statement of Sarah Caroline Britt in Response to Rubric 2-12 dated 10 April 2018 (**Britt Statement 2-12**) (Exhibit 2.94) (**Exhibit SCB-1**), tab 28 (AMP.6000.0043.2539) and tab 47 (AMP.6000.0043.1562).

81. In fact, the case studies demonstrate that AMPFP's supervision and monitoring processes successfully identified and managed Advisers charging fees without providing services.[90]

82. In addition, and contrary to Counsel Assisting's submission, AMP's audit program was not the only way in which the failure of individual Advisers to deliver services was, and is, detected. That conduct is also detected through complaints, the administration of a consequence management framework, and other support mechanisms such as AMP's advice services desk, Partnership Managers, paraplanners and the activities of the Adviser Process and Improvement Team.[91]

83. AMP has made a series of enhancements to governance, systems, processes and controls to improve its detection of fees for no service activities. The enhancements have been informed through external reviews by PwC which resulted in the "AMP financial advice review" report dated March 2015 and the "AMP Advice Control Framework Operational Effectiveness Review" report dated November 2017 (**PwC 2017 report**).[92]

84. The particular enhancements AMP has made to improve the detection of fees for no service activity include:

    a. the introduction of risk-based auditing approaches, where higher risk Advisers are specifically targeted (using data analytics and the development of key risk indicators);

    b. the establishment of a Chief Risk Officer role and sub-roles to ensure independent oversight over compliance, coupled with an overall executive focus on risk management across AMP, and refining the composition of Advice Licensee boards;

    c. additional resourcing and capabilities for the Advice Complaints team (leading to an improvement in complaints handling);

[90] Exhibit SCB-1, tab 48 (AMP.6000.0043.2537) is an example of the operation of this framework resulting in the detection of fees for no service activity.

[91] Witness Statement of Anthony George Regan dated 11 April 2018 (**Regan Statement 2-20**) (Exhibit 2171) at [70].

[92] Exhibit AGR-2 to Regan Statement 2-20 (**Exhibit AGR-2**), tab 18 (AMP.6000.0003.8310) and tab 19 (AMP.6000.0006.5018).

d. the adoption of an updated AMP Group Whistleblowing policy and procedures;[93] and

e. specific additional programs to encourage Advisers to self-report. AMP is seeing a material increase in the level of self-reporting of incidents by Advisers from 2015 to 2017.[94]

85. AMP is also continuing to implement measures as part of our Advice Business Review Program to prevent and detect fees for no service activity within our Adviser network. There are further significant steps being undertaken by AMP in response to the PwC 2017 Report.[95]

86. AMP is also seeking to address the fact that some fee for no service activity has occurred, in part, as a consequence of the industry adjusting to regulatory change at a rapid pace. To assist in supporting AMP's Adviser networks AMP has instituted significant enhancements to its education and training platforms.[96] These measures include having Advisers meet new education levels, in line with the standards set by the Financial Adviser Standards and Ethics Authority Limited and formalising its Adviser accreditation policy.

87. Accordingly, it is not open on the evidence before the Commission to make a finding that there has been any breach by AMP's Advice Licensees of the condition of their financial services licenses to take reasonable steps to ensure that their ARs comply with the financial services laws (section 912A(1)(ca)) or to have adequate risk management systems (section 912A(1)(h)).

[93] Exhibit AGR-2, tab 20 (AMP.6000.0007.3657).
[94] Regan Statement 2-20 (Exhibit 2.171) at [104(i)].
[95] Regan Statement 2-20 (Exhibit 2.171) at [108]-[114].
[96] Regan Statement 2-20 (Exhibit 2.171) at [39]-[50].

***Open finding**: it is open to the Commissioner to find that AMP's communications with ASIC might have amounted to misconduct. It is also open to the Commissioner to find that AMP's conduct in misleading ASIC fell below community standards and expectations.*

88. AMP accepts that it is open to the Commission to find that AMP's communications with ASIC with respect to the Licensee fees for no service issues might have amounted to misconduct as that term is used in the Commission's Terms of Reference. AMP accepts that its communications with ASIC in relation the Licensee fees for no service issue fell below community standards and expectations.

89. The Terms of Reference for the Commission state that the Commissioner is not required to inquire into a particular matter to the extent that he is satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding. The conduct of AMP and its Licensees in relation to the failure to turn off fees, including their communications with ASIC with regard to those issues, is the subject of an ongoing ASIC enquiry. There is no evidence before the Commission to suggest that ASIC will not sufficiently and appropriately deal with that matter, and therefore the Commissioner ought to be satisfied that ASIC will do so.

90. Accordingly, the Commissioner should not make any findings in respect of whether AMP's communications with ASIC contravened section 1308 of the Corporations Act.

***Open finding**: It is open to the Commissioner to find that AMP's conduct in misleading ASIC was attributable to the culture and governance practices of AMP.*

91. Consistent with the evidence AMP put before the Commission, in Mr Regan's statement[97] and the Clayton Utz report,[98] AMP accepts that this finding is open.

[97] Regan Statement 2-4 at [264].
[98] Exhibit AGR-1, tab 3 (AMP.6000.0010.0440 at .0444 [10(c)] and .0518-.0520 [223]-[224]).

92. It is for that reason that AMP's responses to the identification of this issue and the findings of the Clayton Utz report have included a risk culture audit undertaken by Deloitte,[99] and the centralisation of AMP's regulatory engagement. Responses to notices and requests for information from ASIC are now generally addressed by a specialist centralised Regulatory Engagement Team, which reports to the General Counsel, Dispute Resolution & Regulatory Engagement. All of these responses to ASIC are now subject to formal verification and certification by those responsible within the business. These processes have been reviewed and assured by external counsel.[100]

***Open finding**: it is open to the Commissioner to find that the conduct in connection with the Clayton Utz report might have amounted to misconduct by contravening sections 1308(2) and (3) of the Corporations Act, and section 64 of the ASIC Act.*

93. In order to make out a contravention of section 1308(2) of the *Corporations Act*, the following elements must be proven, beyond reasonable doubt:[101]

    a. a person must have made or authorised a statement:

        i. in a document required by or for the purposes of the *Corporations Act* or lodged with or submitted to ASIC;

        ii. that is false or misleading in a material particular, or omits any matter without which the document is misleading in a material respect; and

        iii. with the knowledge that the statement is false or misleading;[102] and

[99] Regan Statement 2-4 at [37(b)].

[100] Regan Statement 2-4 at [273]-[278].

[101] The criminal standard of proof is required, given the provision is a criminal offence: *Criminal Code Act 1995* (Cth) sch 1 (**Criminal Code**) s 13.2.

[102] Section 12.3 of the Criminal Code sets out what must be proven in order to attribute knowledge to a body corporate.

b. where the statement is made or authorised based on information that, to the person's knowledge, is false or misleading in a material particular or omits a matter which renders the information misleading in a material respect, the person is taken to have made or authorised a statement that to their knowledge was false or misleading (s 1308(3)).

94. In order to make out a contravention of section 64 of the ASIC Act, the following elements must be proven, beyond reasonable doubt:[103]

a. a person must have given information or made a statement:

i. in purported compliance with Part 3 of the ASIC Act; and

ii. that is false or misleading in a material particular; and

b. intention.[104]

95. Section 64(3) provides a defence, if it is proved that the defendant, when giving the information or making the statement, believed on reasonable grounds that it was true and not misleading.

96. Counsel Assisting did not articulate in submissions with precision what the allegedly false or misleading statement was, its source, the reason why it was false or how the conduct of AMP could be said to satisfy the elements of either offence. The way falsity was sought to be articulated also lacked any particularity, or detailed analysis of the evidence.

97. Even if a statement in a document submitted to ASIC (for the purposes of s 1308) or made in response to a section 33 notice (for the purposes of s 64) were misleading, there is no evidence before the Commission of the effect of any such statement upon ASIC, such that the statement could be said to be misleading in a material particular. In circumstances where ASIC has continued to investigate the matters the subject of the Clayton

[103] The criminal standard of proof is required, given the provision is a criminal offence: Criminal Code s 13.2.

[104] Section 5.6 of the Criminal Code specifies that intention is the relevant fault element and s 12.3 of the Criminal Code sets out what must be proven in order to attribute intention to a body corporate.

Utz report, it is difficult to understand how any statement regarding the character of the report could be considered material.

98. Moreover, knowledge or intent are key elements of each of the offences. There is no evidence before the Commission of the knowledge or state of mind of Mr Salter, nor any other possibly relevant person. Mr Salter may well say he reasonably believed that his interaction with Clayton Utz had no bearing on the independence of the investigation from the business. Clayton Utz may well say similar things.

99. There is also no evidence that Mr Salter made any changes to the report with which Clayton Utz did not agree, nor is there any evidence that Clayton Utz believed its independence, in the sense required by the retainer, was affected by any interactions with Mr Salter (or others from AMP).

100. It could never have been contemplated, by AMP or by ASIC, that the report prepared by Clayton Utz would meet the requirements of Regulatory Guide 112. Clayton Utz is a member of AMP's external legal panel, and was acting for AMP (as ASIC was aware) in relation to ASIC's investigation into the very conduct that was the subject of the report. The relationship between AMP and Clayton Utz was such that there could be no expectation, by AMP or ASIC, that any report prepared by Clayton Utz could have been intended to be independent within the meaning of Regulatory Guide 112.

101. In the absence of hearing from ASIC, Clayton Utz, Mr Salter and any other person alleged to have relevant knowledge, and the absence of any proper explanation of how it is said that the elements of either offence are satisfied, and in light of the gravity of the matter, it is respectfully submitted that it would be unsafe for the Commissioner to make any finding in respect of AMP's communications regarding the Clayton Utz report.

4 May 2018